

DOCUMENT RESUME

03607 - [A2553672]

[Exclusion of Nonmanufacturers from Participation in Government Printing Office Procurements for Printed Products]. B-189145. September 9, 1977. 7 pp. + 5 enclosures (5 pp.).

Decision re: Southwest Forms Management Services; by Robert F. Keller, Deputy Comptroller General.

Issue Area: Federal Procurement of Goods and Services (1900).
Contact: Office of the General Counsel: Procurement Law II.
Budget Function: General Government: Other General Government (806).

Organization Concerned: Government Printing Office.

Authority: Walsh-Healey Public Contracts Act (41 U.S.C. 35-45).
44 U.S.C. 103. 4 C.F.R. 20.2(b) (2,3). B-187790 (1977). 54
Comp. Gen. 613. 54 Comp. Gen. 606. 54 Comp. Gen. 1096. 55
Comp. Gen. 1. 56 Comp. Gen. 78. 53 Comp. Gen. 209.

The protester objected to the exclusion of nonmanufacturers from participating in Government Printing Office procurements for printed products. Although the protest was untimely, it was considered since it raised questions significant to procurement policy. Although the procedures for prequalification of bidders were restrictive of competition, they were based on the agency's reasonable and longstanding interpretation of the relevant Joint Committee on Printing regulation and therefore were not subject to legal objection. The matter was referred to the Committee for determination of the efficacy of the interpretation. (Author/SC)

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DECISION



Alan Zuckerman.
Proc. II
**THE COMPTROLLER GENERAL
OF THE UNITED STATES**
WASHINGTON, D.C. 20548

FILE: B-189145

DATE: September 9, 1977

MATTER OF: Southwest Forms Management Services

DIGEST:

1. Untimely protest involving challenge to on-going procurement policy which requires pre-qualification of bidders and excludes from competition entire class of business firms raises issue significant to procurement practices and will be considered notwithstanding untimeliness.
2. Questions relating to bidder's standing as a "manufacturer or regular dealer" under criteria of Walsh-Healey Act are not germane to issues presented in protest, since protest involves contracts under \$10,000.
3. Although procedures for pre-qualification of bidders are restrictive of competition, they are based on agency's reasonable and longstanding interpretation of Joint Committee on Printing regulation and therefore are not subject to legal objection. However, matter is referred to Committee for determination concerning efficacy of interpretation.

Southwest Forms Management Services (Southwest) protests the procurement policy of the Government Printing Office (GPO) which excludes non-manufacturers from participating in GPO procurements for printed products for the Federal Government.

Southwest bases its protest on the refusal of the GPO Dallas Regional Printing Procurement Office to permit it to bid on various requirements for business forms. Although the protest is not "timely" under our Bid Protest Procedures in that such GPO refusals occurred more than 10 days prior to the time the protest was filed, see 4 C.F.R. 20.2(b)(2) (1977), and notwithstanding GPO's expressed reservation over our "jurisdiction" in this case because of the timeliness question,

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we will consider the matter because the protest, involving an on-going GPO procurement policy which in effect requires pre-qualification of bidders and excludes from competition an entire class of business firms, raises issues significant to procurement practices and procedures. See 4 C.F.R. 20.2(c).

Southwest represents itself as a "business forms and systems dealership representing manufacturers who have no direct sales force and therefore are not able to sell direct to the Government Printing Office." Southwest states that membership in the National Business Forms Association consists of 662 distributors [brokers] and 199 independent manufacturers.

The GPO considers non-manufacturers who act in their own names as brokers, and those who act as representatives of printing manufacturers as agents, since bids would be submitted in the name of the manufacturer. In the latter case, the contract would be awarded to the manufacturer, while in the former, the broker, if permitted to bid, would be the prime contractor. Southwest fits into the GPO "broker" category and is thus excluded from GPO contract participation. Southwest has expressed interest in bidding only on contracts less than \$10,000.

In its report to this Office, GPO states that the Walsh-Healey Public Contracts Act, 41 U.S.C. 35-45 (1970), prohibits award of contracts for supplies and equipment to other than "manufacturers or regular dealers," and points out that our Office has "consistently denied jurisdiction in this area since such determinations [under the Act's criteria] rest with the contracting officer subject to the final review by the Department of Labor." The protest, however, involves only purchases of less than \$10,000 which, as noted by GPO, are specifically excluded from the coverage of the Act. We are therefore not called upon to consider the protester's status as a "manufacturer or regular dealer" under the Act, although we do agree that we would decline to do so were that an issue. Products Engineering Corporation; Lutz Superdyne, Inc.,
B-187790, March 8, 1977, 77-1 CPD 170.

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GPO also refers to several factors, relating to the establishment of bid lists, to determinations of responsibility, and to contract administration, which purportedly support its exclusionary policy.

As an example, GPO states that contractors desiring to do business with the agency are required to complete an "equipment questionnaire" containing, among other things, information on the location of the production facilities, the type of production equipment, and the types and categories of work for which the firm desires to compete. GPO maintains that its bid lists are developed from such questionnaires and that the information also serves as an aid for determining contractor responsibility. GPO asserts that it would be unable to categorize brokers' product lines in a similar fashion and that the brokers would gain an unfair competitive advantage because they own no production equipment of their own. GPO also claims that in the absence of a questionnaire specifying the bidder's available production equipment, the agency would be required to perform a "full precaward survey of the contractor's plant and financial standing" prior to award. GPO also perceives difficulty in administering prime contracts where production is performed by a subcontractor because of delays in dealing "through an intermediary, especially on jobs with short schedules." GPO states it would be difficult to "fix responsibility in cases involving defaults or rejections."

GPO's bid list preparation procedures admittedly exclude non-manufacturers from GPO printing procurement bid lists, and we have been informally advised that a known broker who requested an invitation to bid would be advised that award would not be made to him if a bid were submitted in the name of the broker. Thus, the procedures obviously result in a pre-qualification of bidders.

We have held that any system for pre-qualification of offerors is to some degree in derogation of the principal tenet of the competitive system that bids or proposals be solicited in such a manner as to permit

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the maximum amount of competition consistent with the nature and extent of the services or items to be procured. METIS Corporation, 54 Comp. Gen. 613 (1975), 75-1 CPD 44. The validity of the pre-qualification system depends not on whether it restricts competition per se, however, but whether it unduly restricts competition. 53 Comp. Gen. 209 (1975).

We have held that procedures designed to pre-qualify bidders/offers merely for the purpose of limiting the required number of solicitation documents was not a legitimate restriction on competition. 53 Comp. Gen. 209, supra. We have also held that restricting bidders on procurements for QPL (qualified products list) products to manufacturers and authorized distributors, because of the agency's greater confidence that manufacturers and authorized distributors will offer the required qualified product, was overly restrictive. D. Moody & Co., Inc., et al., 55 Comp. Gen. 1 (1975), 75-2 CPD 1. See also Department of Agriculture's Use of Master Agreements, 54 Comp. Gen. 606 (1975), 75-1 CPD 40.

We have, on the other hand, approved proposed use of Basic Ordering Agreements when limited to exigency situations and when a non-competitive award might otherwise be made, Department of Health, Education and Welfare's use of basic ordering type agreement procedures, 54 Comp. Gen. 1096 (1975), 75-1 CPD 392, and have upheld the proposed use of a qualified products list for microcircuits by the National Aeronautics and Space Administration in view of the extremely high level of quality and reliability required and the impossibility of testing before acceptance or use. 50 Comp. Gen. 542 (1971). We also approved a modified plan for use of master agreements by the Department of Agriculture which incorporated procedural safeguards designed to enable small firms to compete. Department of Agriculture's Use of Master Agreements, 56 Comp. Gen. 78 (1976), 76-2 CPD 390.

In general, we have sustained pre-qualification in cases where no supplier was necessarily precluded from competing for a procurement. Accordingly, we would be inclined to question the GPO approach since

it obviously does automatically exclude an entire class (brokers) of potential suppliers. However, we are also advised by GPO that it is precluded from dealing with printing brokers because of the regulations of the Congressional Joint Committee on Printing (JCP) promulgated pursuant to the authority currently set forth in 44 U.S.C. 103 (1970). The JCP regulation referred to was issued on July 1, 1942, and provides in pertinent part:

"Questionnaire for contract printing.-The Government Printing Office, in an endeavor to mobilize the printing industry for assisting in the prosecution of the war, and to secure information on printing facilities in the furtherance of competition has sent out questionnaire forms to commercial printers. The questionnaire requests among other information: (a) The name and location of the printing establishment; (b) the volume and type of business transacted; * * * (d) size of the plant and receiving and shipping facilities; (e) details regarding numbers of employees and types of equipment in the composing, platemaking, press, and bindery units; * * *. The information obtained in the questionnaire permits the selection for circularization of invitations to bid of firms which have the necessary printing facilities in any particular area.

"File of commercial printing establishments.-A file of questionnaires shall be maintained in * * * the Government Printing Office * * *. The file shall afford convenient reference with suitable classifications of printing facilities as disclosed in the questionnaires, to the end that appropriate selections may be made for circularizing commercial printing establishments * * *.

* * * * *

"Preparation of lists for circularizing bidders.-Invitations to bid * * * shall be sent to companies falling within a selected classification. * * * The system shall be operated in such manner to afford equal opportunity to all qualified commercial printers recorded in the file to bid on successive job circulars.

* * * * *

"Specifications [invitations to bid] are submitted for bids on the facilities within individual plants for the purposes of economy, speed, quality and the fixing responsibility. The proposal [invitation] must not be transferred to another source." (Emphasis added in narrative.)

The regulation, issued during the earliest stages of World War II "in an endeavor to mobilize the printing industry * * * for the prosecution of the war;" to secure information on printing facilities in furtherance of competition; and "to afford equal opportunity to qualified commercial printers * * * to bid," apparently has been consistently interpreted to exclude firms other than manufacturers from bidding on GPO printing contracts. Although we are not convinced that the cited JCP regulation is a clear statement of that Comm. tee's intention to exclude non-manufacturers, we note, for example, that the regulation does not prohibit the solicitation of bids for printing from non-manufacturing sources as it only deals with the establishment of bid lists for commercial printers and the solicitation of bids from those sources, that interpretation has been followed for 35 years.

For example, Article 3, GPO Contract Terms No. 1 (1970) (the "boilerplate" included in GPO printing contracts) entitled "Subcontracts," provides in pertinent part that:

"No * * * [subcontract] shall be made by the contractor with any other party for furnishing any of the completed, or substantially completed, articles or work herein contracted for without the written approval of the contracting officer * * *. Procurement of typesetting, engraving, plates (offset and letterpress), negatives or positives, binding, and distribution are excepted from the provisions of this Article."

According to GPO, the foregoing "effectively prohibits the subcontracting of the actual printing (presswork)

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of the ordered product." The provision, however, does not prohibit the owner of the press from subcontracting virtually every other aspect of the manufacturing process, which, except for contracts requiring only printing (presswork), can be more costly than the presswork itself. In addition, Article 3 virtually eliminates any probability of the award of a prime contract in which presswork is involved to any other printing establishment (binderies or compositors as examples).

Under the circumstances, we cannot say that GPO's 35-year interpretation of the regulation is unreasonable. The Joint Committee on Printing could, if it considered such restrictions as "necessary to remedy neglect, delay, duplication or waste in the public printing," 44 U.S.C. § 103 (1970), set the limitations complained of here, and we have been advised that the regulation has not been rescinded, updated or further clarified with respect to the portions with which we are concerned. Consequently, we cannot object to GPO's current approach and the protest is therefore denied.

However, inasmuch as GPO's interpretation of the regulation has the effect of totally excluding an otherwise eligible class of bidders (brokers) and all printing establishments which do not perform the actual presswork on contracts where presswork is required, we are referring the matter to the Joint Committee for its determination as to whether GPO's current policies are in keeping with the Committee's interpretations of its regulation or if those policies should be continued.

Deputy


Comptroller General
of the United States



COMPTROLLER GENERAL OF THE UNITED STATES
WASHINGTON, D.C. 20548

Alan Jackson
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September 9, 1977

The Honorable Howard W. Cannon
Chairman, Joint Committee on
Printing
Congress of the United States

Dear Mr. Chairman:

Enclosed is a copy of our decision of today denying the protest of Southwest Forms Management Services against the policies of the Government Printing Office (GPO) which exclude printing brokers from participating in GPO printing contracts.

GPO's policies are based on a July 1, 1942 regulation of the Joint Committee on Printing. Our denial of the protest is based on the fact that GPO's interpretation of the regulation is both longstanding and appears to be a reasonable one. However, the effect of that interpretation is to restrict competition on GPO printing procurements. For example, with respect to the various reasons GPO cites in support of its policies excluding brokers, we can see no reason why GPO cannot develop "bid lists" on the basis of information from brokers, including the manufacturers they represent, or why adequate information necessary for evaluation of responsibility cannot be required from printing brokers with their bids if the information obtained prior to the bidding is inadequate for that purpose. Moreover, contracts need not be awarded to printing brokers which, alone or with their proposed subcontractors, lack adequate financial resources. Additionally, "fixing responsibility in cases involving defaults or rejections" during contract performance should be placed where it belongs--with the prime contractor. (In this regard, GPO has offered only one example of a contract inadvertently awarded to a broker which created contract administration difficulties.) In short, we see no reason why dealing with a responsible broker/prime contractor rather than with the printer would present any greater difficulties with respect to

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both determining bidder responsibility and administering the subsequently awarded contract than are found in most Federal contracts where subcontractors are involved.

Accordingly, we are referring this matter to you for a determination as to whether, in your view, CPO's policies are consistent with the regulation or whether those policies should be changed. We would appreciate being informed of the Committee's conclusions regarding this matter.

Sincerely yours,


Deputy Comptroller General
of the United States

Enclosure



COMPTROLLER GENERAL OF THE UNITED STATES
WASHINGTON, D.C. 20548

Alan Zuckerman
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September 9, 1977

The Honorable Howard W. Cannon
Chairman, Joint Committee on
Printing
Congress of the United States
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Sincerely yours,

Deputy


Comptroller General
of the United States

Enclosure



COMPTROLLER GENERAL OF THE UNITED STATES
WASHINGTON, D.C. 20548

Alan Zuckerman
Peru

B-189145

September 9, 1977

The Honorable Thomas F. McCormick
Public Printer
United States Government Printing
Office
Washington, D. C. 20401

Dear Mr. McCormick:

We are enclosing our decision denying the protest of Southwest Forms Management Services against the policy of the Government Printing Office (GPO) to exclude printing brokers from participating in GPO printing contracts because it appears to be based on a reasonable and longstanding interpretation of a Joint Committee or Printing regulation dated July 1, 1942. The protest concerned contracts of \$10,000 or less which are not within the purview of the Walsh-Healey Act.

Except for the JCP regulation, we would question the restriction resulting from GPO's bidder pre-qualification procedures.

We therefore are referring this matter to the Joint Committee for its determination as to whether GPO's policies are consistent with the regulation or if the policies should be changed.

Sincerely yours,

By K. J. K.
Deputy Comptroller General
of the United States

Enclosure



COMPTROLLER GENERAL OF THE UNITED STATES
WASHINGTON, D.C. 20548

Alan Zuckerman
Proc #

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September 9, 1977

The Honorable Lloyd Bentsen
United States Senate

Dear Senator Bentsen:

We refer to your interest in the protest of Southwest Forms Management Services, Dallas, Texas against certain procurement policies of the United States Government Printing Office.

Enclosed is a copy of our decision which denies the protest.

Sincerely yours,

Deputy

W. K. Sullivan
Comptroller General
of the United States

Enclosure



COMPTROLLER GENERAL OF THE UNITED STATES
WASHINGTON, D.C. 20548

Alan Zuckerman
Per F

B-189145

September 9, 1977

The Honorable James M. Collins
House of Representatives

Dear Mr. Collins:

We refer to your interest in the protest of Southwest Forms Management Services, Dallas, Texas against certain procurement policies of the United States Government Printing Office.

Enclosed is a copy of our decision which denies the protest. Your correspondence is returned as requested.

Sincerely yours,

[Signature]
Deputy Comptroller General
of the United States

Enclosures